STATE OF MICHIGAN

IN THE SUPREME COURT

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased,

Plaintiff-Appellee,

-vs-

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.

/

Supreme Court No. 121723

Court of Appeals No. 228972

Lower Court No. 98-810412-NO

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased,

Plaintiff-Appellee,

-vs-

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.

/

Supreme Court No. 121724

Court of Appeals No. 234992

Lower Court No. 01-104360 NH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

PROOF OF SERVICE

*** ORAL ARGUMENT REQUESTED ***

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I. DID THE COURT OF APPEALS PROPERLY DETERMINE THAT PLAINTIFF-APPELLEE'S CAUSE OF ACTION WAS BASED ON ORDINARY NEGLIGENCE, NOT MEDICAL MALPRACTICE?

Plaintiff-Appellee says: "Yes"

Defendant-Appellant says: "No"

COUNTER-STATEMENT OF FACTS

This is a wrongful death action filed on behalf of Catherine Hunt, who died on March 4, 1997 as a result of injuries she sustained while a resident in a Detroit nursing home, Oakpointe Villa Nursing Centre, Inc.

Mrs. Hunt became a resident of Oakpointe Villa Nursing Centre (hereinafter: "Oakpointe Villa") in April 1996 after being diagnosed with dementia. Mrs. Hunt, who was a women of slight build, required complete assistance with respect to transfers, movement, dressing, eating, toileting and bathing. (Apx. pg. 59a-60a). At the time of her admission, Oakpointe Villa provided Donald Dreyfuss, D.O., the facility's medical director, to Mrs. Hunt as her attending physician. Dr. Dreyfuss wrote an order providing for the use of side rails to be used on Mrs. Hunt's bed on an as-needed basis.

The events leading to Mrs. Hunt's death began on March 1, 1997 and involved an incident witnessed by two of the Certified Evaluated Nursing Assistants (hereinafter: "CENAs" or "nursing assistants.") working at Oakpointe Villa. Nursing assistants are nursing home employees who are charged with the routine responsibilities of assisting residents with eating, dressing, getting into and out of bed and getting into and out of wheelchairs. (Apx. pg. 15b).

On March 1, 1997, two nursing assistants, Valerie Roundtree and Monee Olds, entered Mrs. Hunt's room and noticed that Mrs. Hunt was lying very close to the rails of the bed. (Apx. pgs. 16b-17b). They immediately moved Mrs. Hunt away from the rails. Ms. Roundtree was aware of the fact that proximity to the bed rail could pose serious hazards to a resident in Mrs. Hunt's condition. The two were also aware of the fact that Mrs. Hunt was frail and "fidgety," tending to move around in her bed. (Apx. pgs. 18b-19b, 21b-22b). Thus, when the two nursing assistants witnessed Mrs.

Hunt lying near the bed rail on March 1, 1997, Ms. Roundtree remarked to Ms. Olds, "Oh boy, she's quite close to the rails. We need to keep an eye on her." (Apx. pg. 16b). Six days after this incident, Ms. Roundtree prepared a written statement in which she indicated that "I made a statement on March 1, 1997 to Monee Olds that if they don't watch it, they will find this lady hung."

Mrs. Hunt's physical condition and her position on the bed near the rails were serious enough that Ms. Roundtree deemed it necessary to advise a supervising nurse of what she and Ms. Olds had seen. There is some dispute in the record on the question of whether what the two nursing assistants witnessed on March 1, 1997 regarding Mrs. Hunt was ever communicated to a supervising nurse. Both Ms. Roundtree and Ms. Olds testified at a subsequent arbitration hearing that Ms. Roundtree reported to a nurse supervisor, Kafi Wilson, what she had seen in Mrs. Hunt's room and of her concern for Ms. Hunt's safety. (Apx. pgs. 17b, 23b-24b). Ms. Wilson, however, denied talking to a nursing assistant about Mrs. Hunt on March 1, 1997 (Apx. pgs. 76a-77a). Later, Oakpointe Villa terminated Ms. Roundtree allegedly because she never reported the incident she had witnessed with Mrs. Hunt to a supervisory nurse. *See* (Apx. pgs. 9b-11b).

Regardless of this dispute over what was or was not communicated to the nursing staff, one point is absolutely clear - nothing was done to address the problem which Ms. Roundtree and Ms. Olds witnessed on March 1, 1997. At the subsequent arbitration hearing, Oakpointe Villa's Director of Nursing, Alberta Dossie, conceded that when Ms. Roundtree and Ms. Olds found Mrs. Hunt close to the bed's rails on March 1, 1997, Mrs. Hunt "was at a great potential for harm." (Apx. pg. 14b). Yet, despite this fact, nothing was done to address the great potential for harm presented to Mrs. Hunt.

The great potential for harm which the two nursing assistants had observed on March 1,

1997, was realized the very next day. In the morning hours of March 2, 1997, nursing assistants entered Mrs. Hunt's room and found that she had become trapped between the mattress of her bed and the side rail. As a subsequent state investigative report of this incident described, Mrs. Hunt was found on March 2, 1997, "with her feet and legs on the floor and her head and neck under the bed side rail with her neck wedged between the side rail and the mattress." (Apx. pg. 6b). After discovering Mrs. Hunt wedged between the mattress and the bed rails, the Oakpointe Villa staff had some difficulty extricating her. When she was finally freed, Ms. Hunt was taken to Grace Hospital where she died two days later. The cause of death listed on her death certificate was positional asphyxia.

Mrs. Hunt's asphyxiation death led to an immediate investigation by the City of Detroit Police Department. On March 2, 1997, the same day that Mrs. Hunt was found wedged between the side rail and mattress, a Detroit Police Department Detective, Steven Simmons, went to Oakpointe Villa to interview potential witnesses. One of the witnesses Detective Simmons interviewed was Latanya McCool, one of the nursing assistants who had found Mrs. Hunt trapped between the mattress and the bed rails earlier that day. Mrs. McCool told Detective Simmons that the first thing she saw when she entered Mrs. Hunt's room was her legs. Mrs. McCool added, "I went to see if she was caught in the rail *again*." (Apx. pg. 1b). (emphasis added). Detective Simmons inquired if Mrs. Hunt had become caught in the railing previously and Mrs. McCool responded, "I was told that she did it before." *Id.*

Within days, Oakpointe Villa terminated Valerie Roundtree from her position as a nursing assistant. Ms. Roundtree challenged that termination through a union grievance proceeding. A hearing was held on her grievance on April 30, 1998.

Ms. Dossie, Oakpointe Villa's Director of Nursing, testified at the arbitration hearing that on the morning that Mrs. Hunt was found caught between the mattress and the bed rail, she found Ms. Roundtree talking with a group of people. Ms. Dossie testified that Ms. Roundtree and others "were trying to get their alibis together." (Apx. pg. 7b). Mrs. Dossie also testified that she overheard Ms. Roundtree say that, "this was an accident waiting to happen" because Mrs. Hunt was "fidgety" and she slid between the mattress and the rail "all the time." (Apx. pg. 8b).

Ms. Dossie also indicated in her arbitration testimony that she had a conversation with Ms. Roundtree during which Ms. Roundtree admitted that she had prior knowledge of Mrs. Hunt's dangerous situation, which she did not share with any of her supervisors:

> Well, in speaking with Ms. Roundtree I established, first of all, with her whether she had any prior knowledge that this lady had any problems. And she said, yes, that she knew that she had a problem. She stated that everybody knew that she had problems. And then I asked her about you - - no, to be more specific. I said, 'If you know that she had problems and that she was a potential for injury to herself, did you notify the charge nurse?' And she said no. And she went on to explain that the nurses weren't - - wouldn't do anything and you know, you can tell them things and they never do anything.
>
> (Apx. pgs. 9b, 12b).

During the arbitration hearing, Alberta Dossie gave extensive testimony regarding how Mrs. Hunt's death could have been prevented if Ms. Roundtree had reported what she had seen:

> A [Ms. Roundtree] said that she'd actually seen this resident in a compromised position, slipped to the side of the rails. Even when she was on another unit she mentioned.
>
> Q And are you saying that's what she failed to report?
>
> A Exactly, because she - - I'm not saying that if she had reported that the lady - - she had seen the lady slip between the side of the rails, that she would - - any of us would assume that that

> meant the lady would asphyxiate. However, we could have gotten bigger pads for that rail, maybe a bigger mattress for the bed so that the rail - - there would not have been a gap there, but there's interventions that could have been done and had anyone assessed that this was a reality.

(Apx. pgs. 12b-13b)

Thus, Ms. Dossie acknowledged that one of the things that could have been done to prevent Mrs. Hunt's death would be to get a bigger mattress which could have prevented her from becoming trapped between the mattress and the bed's side rails.

In a decision dated July 28, 1998, the arbitrator presiding over Ms. Roundtree's grievance reinstated her to her position. (Apx. pgs. 25b-43b). The arbitrator found that Ms. Roundtree did, in fact, find Mrs. Hunt on March 1, 1997 in a position of serious danger, but that Ms. Roundtree communicated her concerns to her charge nurse. The arbitrator found:

> Valerie Roundtree admits that during her rounds she and another co-worker, Monee Olds, observed a resident, [Catherine Hunt], who she felt was so small, frail and fidgety, that there was a danger [Mrs. Hunt] could slip through the bed rails.
>
> According to Valerie Roundtree, she informed the charge nurse of her concerns about [Catherine Hunt]. This is unrebutted.

(Apx. pg. 42b).

Meanwhile, The Michigan Department of Consumer and Industry Services conducted two investigations into Mrs. Hunt's asphyxiation death. On March 13, 1997, nine days after Mrs. Hunt died and eight days after Oakpointe Villa fired Ms. Roundtree for alleged abuse and neglect, the matter was investigated by Grace Andrews, a registered nurse employed by the State of Michigan. Ms. Andrews testified that she interviewed Ms. Dossie and Shela Myrick, Oakpointe Villa's Administrator. She also spoke to an unidentified nurse or LPN over the phone whose name she

could not recall. Ms. Andrews was never advised that the facility had terminated Ms. Roundtree for abuse and neglect for her involvement in the events leading to Mrs. Hunt's death. Ms. Andrews originally determined that she was unable to substantiate a violation of state regulations.

Subsequently, the State of Michigan conducted a second investigation of Oakpointe Villa. As a result of this investigation which occurred on August 5, 1997, citations were issued to Oakpointe Villa arising out of the death of Mrs. Hunt. (Apx. pgs. 3b-6b). The State of Michigan specifically found that the facility had violated certain regulations in failing to insure that a resident's environment remained free of accident hazards.

Cora Urquhart was the State of Michigan investigator who conducted the second investigation into Mrs. Hunt's death. Ms. Urquhart testified that she had, in fact, personally inspected the bed and side rail involved in Mrs. Hunt's death. (Apx. pg. 44b). She observed gaps in other beds between the mattresses and the side rails. (Apx. pg. 46b). Ms. Urquhart opined that the essence of the problem was the fact that the mattress did not fit tightly into the bed resulting in a loose fit and a gap. (Apx. pg. 45b). Ms. Urquhart testified that the bed itself was not safe because of the gap between the mattress and the side rails.

Ms. Urquhart also confirmed that when she performed her inspection of Oakpointe Villa in August 1997, Alberta Dossie, the facility's Director of Nursing, gave her a copy of an alert promulgated by the Food and Drug Administration in 1995 (Apx. pgs. 47b-49b), which specifically warned about the number of individuals every year who die as a result of positional asphyxia when they become caught or entangled in side rails.

This civil action was filed in the Wayne County Circuit Court on April 3, 1998 by Denise Bryant (hereinafter: "Ms. Bryant" or "plaintiff"), Mrs. Hunt's niece and the Personal Representative

of her estate. The case was originally assigned to Judge Pamela R. Harwood.

The complaint as ultimately amended stated that Oakpointe Villa owed Mrs. Hunt a duty "to provide an accident-free environment. . . and to further assure that she was not abused, neglected or subjected to unreasonable risk of harm, injury or death." (Apx. pg. 21a), The complaint further asserted that Oakpointe Villa had a duty to assure that its nursing assistants "were properly trained regarding dangers posed to nursing home residents by bed rails and positional asphyxia." *Id.*

The complaint alleged that the defendant breached the duty it owed to Mrs. Hunt through the following negligent acts or omissions:

> (a) Negligently and recklessly failing to assure that plaintiff's decedent was provided with an accident-free environment;
>
> (b) Negligently and recklessly failing to train CENAs to assess the risk of positional asphyxia by plaintiff's decedent despite having received specific warnings by the United States Food and Drug Administration about the dangers of death caused by position asphyxia in bed rails;
>
> (c) Negligently and recklessly failing to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 entangled between the bed rails and the mattress;
>
> (d) Negligently and recklessly failing to inspect the beds, bed frames and mattress to assure that the risk of positional asphyxia did not exit for plaintiff's decedent.
>
> (Apx. pgs. 22a-23a).

On May 1, 1998, Oakpointe Villa filed a motion for summary disposition. In that motion, Oakpointe Villa argued that, although the case was pleaded as an ordinary negligence case, it was a medical malpractice action. As such, the defendant argued that, pursuant to MCL 600.2912b, plaintiff was compelled to provide pre-suit notification and that, pursuant to MCL 600.2912d, the

complaint had to be accompanied by an affidavit of merit. Because plaintiff had neither served defendant with a pre-suit notice of intent to sue nor filed an affidavit of merit with the complaint, Oakpointe Villa requested that the case be dismissed.

Plaintiff responded to the defendant's motion by arguing that the claims raised in the complaint stated only claims of ordinary negligence, not medical malpractice. Since the only claims raised in the case were claims of ordinary negligence, plaintiff argued that the statutory requirements for medical malpractice cases provided in MCL 600.2912b and MCL 600.2912d were inapplicable.

On August 3, 1998, Judge Harwood denied the defendant's motion, ruling that plaintiff's cause of action was not based on medical malpractice.

In January 1999, Judge Harwood recused herself from further participation in the case. The case was reassigned to Judge John Murphy.

In October 1999, Oakpointe Villa filed another motion for summary disposition. In that motion, it raised precisely the same issues which it had argued in its May 1998 summary disposition motion. Oakpointe Villa again argued that plaintiff's cause of action was for medical malpractice and that the statutory prerequisites for such suits, MCL 600.2912b and MCL 600 2912d, were applicable. Because plaintiff had not complied with these statutory requirements, the defendant again requested that plaintiff's case be dismissed.

In response to this second summary disposition motion, plaintiff pointed out that precisely the same arguments had been made seventeen months earlier and had been rejected by Judge Harwood. Plaintiff also reiterated her argument that this cause of action was premised on ordinary negligence, not medical malpractice.

Judge Murphy decided the issues raised in the defendant's motion in a written Opinion and

Order dated June 16, 2000. (Apx. pgs. 80a-94a). He concluded that the portion of plaintiff's cause of action based on Oakpointe Villa's direct negligence for its negligent training of its staff should be classified as a medical malpractice claim. (Apx. pgs. 89a-91a). However, Judge Murphy ruled that all claims of Oakpointe Villa's vicarious liability for the negligent acts of its nursing assistants could not be the basis for a medical malpractice claim since these nursing assistants were not members of a state licensed profession. (Apx. pgs. 91a-92a). Despite this ruling, Judge Murphy found it "questionable" whether plaintiff's vicarious liability claim against Oakpointe Villa had been sufficiently pleaded in the First Amended Complaint. (Apx. pg. 92a). Because of this perceived pleading inadequacy, Judge Murphy determined that he would dismiss without prejudice all of plaintiff's claims of vicarious liability based on the ordinary negligence of defendant's nursing assistants. (Apx. pgs. 92a-94a).

Ms. Bryant appealed from the circuit court's June 16, 2000. *Bryant v Oakpointe Villa Nursing Centre*, Court of Appeals No. 228972.

In response to Judge Murphy's June 16, 2000 ruling, plaintiff refiled this case in the Wayne County Circuit Court on February 7, 2001. *Bryant v Oakpointe Villa Nursing Centre*, Wayne County Circuit Court No. 01-104360 NH (Apx. pgs. 103a-113a). Consistent with Judge Murphy's June 16, 2000 ruling, portions of that cause of action were alleged to be based on medical malpractice.

Oakpointe Villa moved to dismiss the malpractice claim, arguing that the Complaint was not timely filed because the plaintiff was not entitled to claim the tolling provision of MCL 600.5856 during the pendency of the prior filed case. In a decision dated June 5, 2001, Judge Murphy denied the defendant's motion, concluding that the limitations period was judicially tolled. (Apx. pgs. 117a-122a). Oakpointe Villa applied for leave to appeal from that decision and the Court of Appeals

granted that request. *Bryant v Oakpointe Villa Nursing Center, Inc.*, Court of Appeals No. 234992. The two pending appeals were consolidated by the Michigan Court of Appeals.

The primary question presented to the Court of Appeals was whether Ms. Bryant's initial cause of action filed in March 1998 represented a claim in whole or in part based on medical malpractice. In a decision announced on May 21, 2002, a panel of the Court of Appeals held that plaintiff's original cause of action represented a claim based on ordinary negligence, not medical malpractice. (Apx. pg. 123a-131a). Based on this Court's decision in *Dorris v Detroit Osteopathic Hospital Corporation*, 460 Mich 26; 594 NW2d 455 (1999) and the Court of Appeals' prior ruling in *Bronson v Sisters of Mercy Health Corp.*, 175 Mich App 647; 438 NW2d 276 (1989), the Court of Appeals held that plaintiff had alleged claims based on ordinary negligence, not medical malpractice:

> We find that plaintiff's complaint that defendant owed a duty to provide an accident-free environment sounds in ordinary negligence and not medical malpractice. Plaintiff's complaint does not call into question the medical judgment of the nursing home in utilizing bed rails for decedent; it does not allege that an error was made regarding decedent's "medical symptoms" or that defendant failed to adhere to the specified "circumstances under which bed rails [were] . . . to be used." MCL 333.21734. Rather, plaintiff's allegation is that decedent died as a result of improper custodial care. Plaintiff's allegation involving the safety of the environment in which decedent was placed and the acts and omissions of decedent and its employees simply does not impugn the exercise of medical judgment.
>
> (Apx. pg. 124a) (citations omitted).

After concluding that the circuit court had erred in identifying any portion of the plaintiff's original cause of action as being based on medical malpractice, the Court of Appeals also reversed the circuit court's dismissal of plaintiff's claims based on Oakpointe Villa's vicarious liability.

(Apx. pg. 125a). The panel ruled that Ms. Bryant's original complaint sufficiently pleaded a claim for vicarious liability as against Oakpointe Villa. (*Id.*).

Thus, the Court of Appeals majority ruled that plaintiff's initial cause of action was to be reinstated in its entirety. Based on its ruling reinstating plaintiff's original cause of action in its entirety, the Court of Appeals majority recognized that the question presented by Oakpointe Villa in its appeal from the circuit court's denial of its summary disposition motion in plaintiff's refiled case was "essentially moot". (Apx. pg. 125a). Despite its observation that it was unnecessary to review the issues raised in Oakpointe Villa's appeal, the Court of Appeals proceeded to address the tolling issue raised in that appeal anyway. The Court of Appeals held that there would be no tolling. *Id.*

Oakpointe Villa sought leave to appeal from the Court of Appeals' May 21, 2002 decision. On July 3, 2003, this Court issued an order granting Oakpointe Villa's request for leave to appeal. *Bryant v Oakpointe Villa Nursing Centre*, 468 Mich 941; 664 NW2d 221 (2003).

SUMMARY OF THE ARGUMENT

The question presented in this case is whether plaintiff's cause of action is based on ordinary negligence or whether it is one which sounds in medical malpractice. The test for distinguishing between these two has been established in numerous cases, most recently in this Court's 1999 decision in *Dorris v Detroit Osteopathic Hospital, supra.* It is the *Dorris* decision which controls here and under *Dorris,* plaintiff's cause of action is a claim for ordinary negligence.

The defendant asks this Court to disregard the ruling in *Dorris* and adopt a different standard for determining whether a claim is based on medical malpractice. Specifically, the defendant suggests that language contained in the statute governing the accrual of a medical malpractice claim, MCL 600.5838a, provides a definition of the term "medical malpractice" for all purposes under the Revised Judicature Act. This argument is wrong. MCL 600.5838, based on its history, its context and its text, does not supply a definition of the term "medical malpractice."

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PLAINTIFF'S COMPLAINT STATED A CLAIM IN ORDINARY NEGLIGENCE NOT MEDICAL MALPRACTICE.

The question which the Court must address in this case is whether plaintiff's cause of action arising out of the death of Catherine Hunt is based on ordinary negligence or whether it represents a claim for medical malpractice. The defendant argues in its brief to this Court that Michigan law has employed three different types of analyses in defining what constitutes a medical malpractice claim. The defendant further asserts that if the case qualifies as a medical malpractice action under any of these different analyses, it must be construed as a claim based on medical malpractice and governed by all of the special statutory rules which adhere to such a cause of action.

The defendant's premise is incorrect. As recently as 1999 in *Dorris v Detroit Osteopathic Hospital, supra*, this Court has outlined the necessary inquiry for distinguishing between a cause of action based on ordinary negligence and one based on medical malpractice. It is the *Dorris* standard which must be applied in this setting and, as the Court of Appeals majority properly ruled in this case, under that analysis, Ms. Bryant's claims do not involve medical malpractice.

The defendant's principal argument for going beyond the *Dorris* Court's ruling is premised on language contained in the Michigan statute pertaining to the accrual of medical malpractice actions, MCL 600.5838a. It is that aspect of the defendant's argument which will be addressed first in this brief.

A. The "Definition" Of Medical Malpractice And MCL 600.5838a.

The first argument which Oakpointe Villa advances is that this Court should adopt the "definition" of medical malpractice provided in MCL 600.5838a(1). The defendant's reliance on MCL 600.5838a(1) as a basis for deciding this case is entirely misplaced. As this Court has already determined on a number of prior occasions, neither MCL 600.5838a(1) nor any other provision of the Revised Judicature Act attempts to define the parameters of a medical malpractice action.

MCL 600.5838a(1) is the statute which governs the accrual of a cause of action based on medical malpractice. That provision states:

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time

> of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

The defendant suggests that this Court should extract one clause from §5838a(1) - "an employee or agent of a licensed health care facility or agency who is engaging in or otherwise assisting in medical care and treatment" - and use that clause to define a medical malpractice action. Thus, the defendant asserts that, because its agents were allegedly "engaging in or otherwise assisting in medical care and treatment," when they were responsible for the acts or omissions that led to Mrs. Hunt's death, this case should be characterized as one for medical malpractice. The defendant's argument based on §5838a(1) is entirely incorrect. To understand why this argument is incorrect, it is first necessary to consider some amount of history associated with this statutory provision.

In 1973 this Court decided the case of *Kambas v St. Joseph Mercy Hospital of Detroit*, 389 Mich 249; 205 NW2d 431 (1973). *Kambas* presented the question of whether a plaintiff's cause of action based on the negligence of nurses employed by the defendant was subject to the two year limitations period applicable to malpractice claims under MCL 600.5805 or the general three limitations period. This Court held in *Kambas* that malpractice in the medical setting was confined to the professional negligence of doctors. Thus, plaintiff's cause of action against the member of the defendant's nursing staff represented a cause of action in ordinary negligence subject to the three year limitations period. *Kambas*, 389 Mich at 255-256.

In the course of its decision in *Kambas*, this Court considered MCL 600.5838, the statutory accrual provision then applicable to all malpractice actions.[1] The *Kambas* Court emphasized,

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[1]At the time *Kambas* was decided, MCL 600.5838 provided:

> A claim based on the malpractice of a person who is, or holds

however, that the Michigan Legislature had not chosen to provide a definition of the term "malpractice", nor had the Legislature sought to disturb the narrow common law definition of the term "malpractice" by broadening the definition of that term by statute:

> Note that the Revised Judicature Act does not define malpractice and neither did the Judicature Act of 1915. If it had been the intent of the Legislature to broaden the malpractice limitation, clearly they should have set forth a definition of malpractice.
>
> *Id.*, pp. 253-254.

Two years after *Kambas* was decided, the Michigan Legislature responded by passing 1975 P.A. 142. Importantly, this amendment did not provide a statutory definition of the terms "malpractice" or "medical malpractice" as used in the Revised Judicature Act. Rather, this act only amended the statutory accrual provision applicable to malpractice actions, MCL 600.5838, adding for the first time the language which is now contained in §5838a(1).[2]

> himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose.

[2]MCL 600.5838(1), as amended by 1975 P.A. 142, provided as follows:

> "(1) A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession, intern, resident, registered nurse, licensed practical nurse, registered physical therapist, clinical laboratory technologist, inhalation therapist, certified registered nurse anesthetist, X-ray technician, hospital, licensed health care facility, employee or agent of a hospital or licensed health care facility *who is engaging in or otherwise assisting in medical care and treatment*, or any other state licensed health professional, accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

This Court had its first opportunity to address the 1975 amendment of MCL 600.5838 in *Sam v Balardo*, 411 Mich 405; 308 NW2d 142 (1981). *Sam* presented the question of whether the statute of limitations governing a claim for professional negligence against an attorney was governed by the two year period applicable to malpractice claims. In addressing this question, the Court reaffirmed a conclusion which it had reached eight years before in *Kambas* - the term "malpractice" as used in both MCL 600.5805 and §5838, "is nowhere defined in the Revised Judicature Act." 411 Mich at 419.

It is important to note that this Court in *Sam* was presented with a legal argument which is indistinguishable from the one which defendant advances in this case. It was argued in *Sam* that the 1975 amendment of the malpractice accrual provision contained a new legislative definition of the concept of "malpractice." The *Sam* Court rejected this argument:

> 1975 P.A. 142 subsequently amended MCL 600.5838; MSA 27A.5838 to provide that a malpractice cause of action may be commenced against one of the enumerated state-licensed health professionals at the time of last treatment or within six months of discovery of the alleged malpractice. *We are convinced that this amendment still pertains to accrual periods and does not define malpractice for purposes of the two-year statute of limitations.*
>
> 411 Mich at 420-421 (emphasis added).

In reaching this conclusion, the *Sam* Court acknowledged that the 1975 amendment to MCL §5838 evidenced a legislative intent to expand the class of health care providers who *might* be subject to a claim for medical malpractice beyond the common law, which had limited such claims

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As can be seen from the 1975 amendment to §5838(1), the Legislature added therein the language "engaging in or otherwise assisting in medical care and treatment." This language was taken verbatim from §5838(1) and replaced in §5838a(1) when the Legislature in 1986 created a statutory accrual provision applicable solely to claims of medical malpractice.

to those against "physicians, surgeons or dentists." 411 Mich at 421, n. 14. But, on the critical question of whether a particular act on the part of a licensed professional constituted malpractice, the *Sam* Court stressed that it was the common law, not the Revised Judicature Act, which controlled:

> It follows then that since the Revised Judicature Act was addressed to procedural reform, substantive rights, such as the definition of malpractice and who may be sued for malpractice, are not defined by the RJA. Instead, the definition of malpractice and liability therefore are to be determined by resort to the common law.
>
> 411 Mich at 424.

The Court returned to this issue in *Adkins v Annapolis Hospital*, 420 Mich 87; 360 NW2d 150 (1984), where it considered the question of what limitations period applied to a hospital. In *Adkins*, the Court reviewed the 1975 amendment to §5838 and found therein, "a legislative intent to alter the common law and subject other health professionals to *potential* liability for malpractice." 420 Mich at 95 (emphasis added). Yet, even after reaching this conclusion, the Court in *Adkins* stressed that not every act of negligence committed by a health care worker identified in §5838 could be classified as medical malpractice:

> The plaintiff has not pursued in this Court is claim that his complaint alleged ordinary negligence, rather than medical malpractice. Some hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice. Illustrating this point, the Court of Appeals below wrote, "[w]e observe that the facts pleaded in this case are distinguishable from those in *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), and *Gold v Sinai Hospital of Detroit, Inc.*, 5 Mich App 368; 146 NW2d 723 (1966), in which patients' suits against hospitals for falls were held to sound in ordinary negligence and not malpractice."
>
> 420 Mich at 95, n. 10.

This quotation from *Adkins* completely refutes one of the main arguments made by defendant in support of its claim that §5838a(1) should control the question presented in this case. The defendant relies heavily on *Adkins*, insisting that the Court held in that case that the amendment of the accrual provision "was effective to modify the common law definition of malpractice." Defendant's Brief, p. 13. This assertion is completely untenable in light of the fact that *Adkins* never described §5838 as providing a new *definition* of malpractice. Indeed, in footnote 10 of the opinion, the *Adkins* Court reaffirmed the common law distinction between ordinary negligence and medical malpractice. To be sure, the *Atkins* decision acknowledged that the 1975 amendment of §5838 had altered the common law. But, what was altered was not the common law *definition* of medical malpractice. Rather, what was altered was the class of health care providers who *could potentially* be subject to a claim for medical malpractice, a class which the common law had limited to doctors. *Kambas*.

This Court's interpretation of the 1975 amendments to §5838 in *Sam* and *Adkins* was later reaffirmed in *Dennis v Robbins Funeral Home*, 428 Mich 698; 411 NW2d 156 (1987). In *Dennis*, the Court addressed the question of the limitations period applicable to a cause of action against a mortician. The defendant in *Dennis* argued that, because he was a licensed professional under §5838, he was entitled to the two year limitations period applicable to malpractice claims. The Court in *Dennis* rejected the argument that the negligence of a person who fits within one of the categories specified in §5838 automatically constitutes malpractice:

> However, defendant errs in relying upon the term "state licensed profession" which is used in MCL 600.5838; MSA 27A.5838. The accrual statute begins with the words "a claim based on the malpractice of . . . a member of a state licensed profession . . ." However, the *Legislature did not intend by that statute to state that*

> *every member of a state licensed profession is necessarily subject to malpractice and thereby covered by the two-year malpractice statute of limitations.*
>
> 428 Mich at 704 (emphasis added).

With this history as a background, it is clear that for a number of reasons the defendant is incorrect in claiming that medical malpractice occurs any time a person or entity identified in §5838a(1) is "engaging in or otherwise assisting in medical care and treatment." First, the defendant's suggestion that §5838a(1) provides a definition of medical malpractice applicable throughout the Revised Judicature Act is directly contrary to at least five decisions of this Court. In *Kambas*, 389 Mich at 253-254, *Sam*, 411 Mich at 419-421, 424, *Adkins*, 420 Mich at 92, *Dennis*, 428 Mich at 702 and *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 329; 535 NW2d 187 (1995), this Court has recognized that the Revised Judicature Act has *never* defined the term "malpractice."[3]

The defendant's argument that §5838a(1) somehow expands the definition of medical malpractice is also contextually flawed. If the Michigan Legislature had, indeed, sought to define the concept of medical malpractice for purposes of all of the provisions of the Revised Judicature Act as the defendant now suggests, it would not have done so through an amendment of a statutory provision which confines itself exclusively to the question of when a medical malpractice case accrues.

A computer search reveals that the term "medical malpractice" is used in the Revised

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[3]Notably, four of these decisions were rendered by this Court after the passage of 1975 P.A. 142, the amendment which for the first time added to the Revised Judicature Act the language now contained in §5838a(1) on which the defendant relies.

Judicature Act in eighteen different statutes.[4] These statutes cover a broad range of topics pertaining to medical malpractice claims, including pre-suit procedures (MCL 600.2912b), expert witness testimony in such cases (MCL 600.2169), the extent of damage awards (MCL 600.1483), the entry of judgments in cases premised on medical malpractice (MCL 600.6304) and the awarding of interest on any medical malpractice judgment (MCL 600.6013). Thus, the term "medical malpractice" is used in many different contexts in the Revised Judicature Act beyond the accrual provision on which defendant relies. If the Michigan Legislature had, in fact, intended to do what the defendant now suggests - to define in §5838a(1) the term "medical malpractice" for all purposes under the Revised Judicature Act - the Legislature would surely have chosen some provision other than the statute limited to the accrual of a medical malpractice claim to effectuate such a change in the law.

Moreover, it is also worth noting that this particular case does not turn on the question of when plaintiff's cause of action accrued. This cause of action accrued in March 1997, with the death of Mrs. Hunt. This case was originally filed in April 1998. Thus, there has never been any suggestion that the accrual provision of §5838a has a role to play in the disposition of this case. The defendants' argument, therefore, seeks to apply to this case a phrase contained in a statute which has absolutely no application herein.

The defendant's argument based on §5838a(1) is also wrong as a textual matter. The first sentence of that statute specifically provides that *a claim for medical malpractice* against a licensed

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[4]The statutes in which the term "medical malpractice" is used in the Revised Judicature Act are MCL 600.1483, MCL 600.2169, MCL 600.2507(2), MCL 600.2912a(2), MCL 600.2912b, MCL 600.2912c, MCL 600.2912d, MCL 600.2912e, MCL 600.2912f, MCL 600.2912h, MCL 600.2955(3), MCL 600.4903, MCL 600.4951, MCL 600.5838a, MCL 600.5851, MCL 600.6013(9)(10), MCL 600.6098, MCL 600.6304.

health care provider or facility accrues as of the date that the malpractice occurs. Thus, the essential prerequisite for the application of §5838a(1) is that there be a claim for medical malpractice. That is the fundamental question presented in this case - whether this is or is not a medical malpractice case. But, §5838a(1) merely poses the existence of a medical malpractice claim as a precondition for application of the accrual principles contained in that statute; as this Court has repeatedly observed, §5838a(1) does not provide the *definition* of that critical term.

In essence, in making the argument that it does, the defendant would have this Court rewrite §5838a(1). In addition to attempting to extend §5838a(1)'s coverage well beyond the issue of accrual, the defendant asks this Court to reconfigure the first clause of that statute to provide something like this:

> (1) For purposes of this act, a claim [against] a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice.

What is of critical importance here is that §5838a(1)'s first clause does not apply to *all* claims against state licensed professionals; it applies only to claims of *medical malpractice* against such professionals. That is precisely the conclusion that this Court reached in *Dennis, supra*. In that case, the defendant, a mortician, asserted that he was a state licensed professional and that under the language then contained in §5838, he was entitled to claim the malpractice statute of limitations. This Court in *Dennis* noted the flaw in the defendant's logic: §5838 did not apply to *all* claims

against a state licensed professional; by its very wording it applies solely to *malpractice* claims against such professionals. In rejecting the defendant's argument in *Dennis*, this Court noted the significance of the first clause of §5838: "The accrual statute begins with the words 'a claim based on the malpractice of . . . a member of a state licensed profession'." 428 Mich at 704. Precisely the same response is due the defendant's arguments regarding §5838a - the statute by its very text does not cover all claims against state licensed health care facilities or professionals, it covers only *medical malpractice* claims against them.

Therefore, as a purely textual matter, §5838a(1) merely poses the fundamental question presented in this case. This accrual statute only extends to "a claim based on medical malpractice." But, while §5838a(1) clearly provides that its reach only includes "a claim based on medical malpractice," that statute offers absolutely no assistance in defining precisely what a medical malpractice claim is.[5]

Finally, the defendant's attempts to equate the language contained in §5838a(1) with a

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[5]While on the subject of begging, as opposed to answering, the basic question presented in this case, something should be said here with respect to the defendant's argument that giving a broad definition to the term "medical malpractice" would be consistent with the "policy" behind the recent statutory damages in medical malpractice litigation often referred to as tort reform. Defendant's Brief, pp. 21-24. The defendant suggests that an expansive view of the concept of medical malpractice would best serve the purposes of "tort reform." What the defendant fails to come to grips with is that, in adopting these statutory modifications of long established common law principles, the Legislature indicated that these changes apply only to actions "alleging medical malpractice," MCL 600.1483, MCL 600.2169; MCL 600.2912a; MCL 600.2912b, MCL 600.2912d. And, while dramatically changing a number of common law principles which govern medical malpractice claims, the Legislature made absolutely no attempt to alter the long established common law definition of what constitutes a cause of action "alleging medical malpractice." In enacting these "reforms", the Michigan Legislature certainly could have expanded their reach by redefining the concept of "medical malpractice" more expansively. But the Legislature did not do so. Thus, the recent "tort reform" legislation, far from supporting the defendant's request for a new, broader interpretation of what constitutes a medical malpractice claim, actually refutes the defendant's position in this appeal.

statutory definition of "medical malpractice" is directly at odds with this Court's most recent discussion of the common law distinction between ordinary negligence and medical malpractice in *Dorris v Detroit Osteopathic Hospital, supra.* As will be discussed in the later sections of this brief, *Dorris* reaffirmed the established principle that whether a particular claim is categorized as one for ordinary negligence or for medical malpractice, "depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." 460 Mich at 46, *citing Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981); *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich 1997). *See also Welsey v Gehrke*, 461 Mich 894, 895; 601 NW2d 695 (1999) (J. Corrigan dissenting). Quite clearly, *Dorris* did not suggest that a medical malpractice claim encompasses every situation in which a person "is engaging in or otherwise assisting in medical care and treatment" as defendant now claims. By reinforcing the common law definition of what constitutes a medical malpractice cause of action, *Dorris* directly refutes the defendant's suggestion that statutory language which has been in existence since 1975 somehow supplies the definition of "medical malpractice" for all purposes under the Revised Judicature Act.

The defendant also suggests that this Court should embrace the language of §5838a(1) as an appropriate definition of the term "medical malpractice" on the basis of this Court's ruling in *Regalski v Cardiology Associates, PC*, 459 Mich 891; 587 NW2d 502 (1998). *Regalski* is, by dint of its brevity alone, a difficult decision to understand. What can be said about *Regalski* is that it involved the question of whether the plaintiff's claim was barred by the applicable statute of limitations. Thus, in this respect, the issue presented in *Regalski*, unlike the instant case, had at least some connection to the question of accrual as set forth in MCL 600.5838a.

Regalski involved a plaintiff who was injured while being moved onto an examination table. The plaintiff in *Regalski* filed suit two years and eleven months after suffering her injuries. This Court's analysis of the limitations issue presented in *Regalski* was confined to a single statement:

> Like the trial judge, the Supreme Court is persuaded that the technician was "engaging in or otherwise assisting in medical care and treatment" in the performance of the act that is the basis of the lawsuit and that the case, therefore, is governed by the two-year period of limitations applicable to medical malpractice claims.

Id. at 891.

In *Regalski*, the Court confined its analysis to the question of whether the conduct of the defendant's agents could be classified as "engaging in or otherwise assisting in medical care and treatment" of the plaintiff under §5838a(1). However, the Court in *Regalski* completely failed to address the preliminary question presented by §5838a(1) as identified in *Dennis* - whether plaintiff's cause of action was, in fact, a cause of action premised on medical malpractice.

Thus, the precise issue presented in the instant case was never addressed by this Court in *Regalski*. The question involved in this case is whether the plaintiff's cause of action constitutes a claim for ordinary negligence or medical malpractice. The Court in *Regalski* purported to apply §5838a(1) to the fact situation presented therein. Yet, in doing so, the *Regalski* Court somewhat inexplicably failed to consider the preliminary question presented even by the text of §5838a(1) - whether the plaintiff's cause of action sounded in ordinary negligence or whether that claim could properly be classified as one for medical malpractice. The *Regalski* preemptory decision is, therefore, extremely difficult to understand.

In any event, to the extent that the peremptory reversal in *Regalski* constituted an adoption of a definition of "medical malpractice" as provided in §5838a(1), *Regalski* is clearly incorrect. Such

an interpretation of *Regalski* would mean that, without referencing any of its prior decisions on the subject, the Court by peremptory order reversed at least five of its own prior precedents which had established that there is no definition of the term "malpractice" provided in the Revised Judicature Act.

Moreover, to the extent that the *Regalski* Court adopted §5838a(1)'s language as a definition of a medical malpractice claim, that determination has, in essence, been corrected by the Court's subsequent decision in *Dorris*. *See also Wesley v Gehrke, supra*, (J. Corrigan, dissenting). As will be discussed in the later sections of this brief, the Court of Appeals decided the question presented in this case on the basis of the test set forth by this Court in *Dorris*. (Opinion, Apx. pg. 124a). The Court of Appeals did not err in doing so.

For all of the foregoing reasons, this Court must reject the defendant's attempt to "define" medical malpractice actions by means of the language contained in §5838a(1). Plaintiff would note, however, that even if this Court were to apply the language of §5838a(1) to this particular case, the defendant would still not be entitled to a determination that plaintiff's cause of action constitutes a claim for medical malpractice.

The language from §5838a(1) which Oakpointe Villa would apply to every Michigan statute which uses the term "medical malpractice" applies to any employee or agent of a licensed health facility "who is engaging in or otherwise assisting in medical care and treatment." The defendant argues at some length in its brief that the agents of the defendant whose negligence is at issue in this case were assisting in Mrs. Hunt's medical care. Thus, for example, a caption to one of the defendant's arguments specifies:

"MCL 600.5838a has extended the definition of medical malpractice

> to include conduct of any employee engaging in or otherwise assisting in *medical care*, regardless of the direct involvement of professional judgment.
>
> Defendant's Brief, p. 16 (emphasis added).

In making this argument, the defendant has misconstrued the very statute which it would have this Court adopt in all malpractice cases. The language from §5838a(1) on which defendant relies does not indicate that the term "medical malpractice" would extend to any person assisting in the *care* of another. Rather, the statutory language on which the defendant relies specifically states that it applies only to a party who assists in the care *and treatment* of another.

This Court has repeatedly indicated that, in construing a statute, every word in that statute must be given effect and no court, "may assume that the Legislature inadvertently made use of one word or phrase instead of another." *Pohutski v City of Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002); *see also Robinson v Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000); *In Re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Thus, this Court cannot ignore the conjunction "and" used by the Legislature in §5838a(1) or the word which follows it, "treatment.". To come within the defendant's proposed definition of "medical malpractice" as derived from §5838a(1), the agents of the defendant must not only have been engaged in providing medical *care* to Mrs. Hunt, but they must also have been engaged in providing medical *treatment* to Mrs. Hunt.

This case arises out of negligence which occurred in a nursing home. As the Court of Appeals properly observed, nursing homes, unlike hospitals, provide "custodial care" which goes beyond the treatment of medical conditions or injuries. (Apx. pg. 124a, *citing Owens v Manor Health Care Corp.*, 159 Ill App 3d 684; 512 NE2d 820 (1987); *see also Franklin v Collins Chapel*

Connectional Hospital, 696 SW2d 16, 20 (Tenn App 1985) (claim for damages by a nursing home resident who was burned when given a bath in hot water, was not a medical malpractice case, but part of "custodial care."); *NME Properties, Inc. v McCullough*, 590 So2d 439, 441 (Fla App 1991). Moreover, part of the negligence involved in this case centers on the acts and omissions of nursing aides. The evidence presented in this case indicates that such aides serve a number of functions in the nursing home setting, including helping residents with eating, dressing and getting into and out of beds. (Apx. pg. 15b). While the defendant does its best to characterize these particular functions as assisting in the *care* of residents such as Mrs. Hunt, that is clearly not enough under the statute which the defendant asks this Court to adopt. Ultimately, to succeed on its claim that this is a malpractice action as "defined" in §5838a(1), the defendant would have to establish not only that the defendant's agents were engaging or assisting in the *care* of Mrs. Hunt, they would also have to establish that they were engaging in or assisting in the medical *treatment* of Mrs. Hunt. The defendant simply cannot satisfy this requirement.

The defendant, in essence, confirms that it does not have proof of the fact that its agents were supplying medical *treatment* to Mrs. Hunt. In another section of its brief, Oakpointe Villa argues that the Court of Appeals' reference to the fact that the defendant was supplying plaintiff with "custodial care" was erroneous. The defendant proceeds to argue in its brief: "Michigan malpractice reform statutes allow for no such distinction between 'healing' and 'custodial shelter care' . . . Michigan law does not permit a distinction between 'healing' and 'maintenance' medical or nursing care." Defendant's Brief, p. 34. Thus, the defendant contends that there is no distinction in Michigan law between the "maintenance" of nursing home residents and the treatment of resident's medical conditions.

These statements in the defendant's brief are absolutely impossible to sustain if the Court does as the defendant asks and adopts the accrual language of §5838a(1) as the definition of medical malpractice for all purposes under the Revised Judicature Act. Under that statute there is a profound difference between care and treatment, or as defendant put it, between "maintenance" and "healing." And, to come within the definition of medical malpractice which the defendant asks this Court to adopt, the defendant would have to establish both. Because the defendant cannot do so under the facts of this case, this cannot be characterized as a medical malpractice action even if the defendant were correct in its (erroneous) interpretation of §5838a(1).

Moreover, there is a statute which directly refutes the defendant's argument. MCL 333.21707 is a provision of the Public Health Code pertaining to the operation of nursing homes. That statute provides that "the course of medical *treatment* provided to a patient in a nursing home shall be prescribed by the patient's physician." MCL 333.21707(1). It is not particularly surprising that the medical *treatment* of nursing home residents is the responsibility of physicians. This case, however, has nothing to do with the conduct of physicians or the medical treatment provided to Mrs. Hunt.

In summary, there is no merit to the defendant's suggestion that this Court should define the term "medical malpractice" for all purposes under the Revised Judicature Act on the basis of certain language contained in the medical malpractice accrual statute, §5838a(1). But, even if the Court were persuaded to do so, Oakpointe Villa would still not be able to claim the benefit of that definition under the particular facts of this case.

B. The Defendant's Alternative Argument Based On The Existence Of A Nursing Home - Resident "Professional Relationship"

Oakpointe Villa offers several alternatives to its argument based on §5838a(1). It first contends that this case should be characterized as a medical malpractice claim because this claim arises out of what the defendant characterizes as a professional relationship - the relationship between a licensed nursing home and one of its residents. The essence of the defendants argument is encapsulated in the following paragraph from the defendant's brief:

> The source of the duty owed by defendant here to plaintiff, which is claimed to have been breached, is the fact that it is a licensed health care facility, and that its relationship to plaintiff is that of patient/health care provider providing medical care. Regardless of whether the particular or immediate error causing the injury involved the exercise of (or failure to exercise) "professional judgment", the duty not to commit that error in the first place arose only because of the unique nature of the professional, health care provider-patient relationship between this health care provider and the plaintiff. This critical fact renders this a claim for malpractice.
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> Defendant's Brief, p. 25.

The defendant proposes that the determination of whether a particular cause of action is or is not a medical malpractice claim should be decided solely on the basis of whether a "professional relationship" exists between a health care facility and the injured party. Thus, under the analysis which defendant urges on this Court, the actual circumstances of how the plaintiff was injured - what happened, whose negligence was involved, what the defendant's agents did or did not do in contributing to the injury - would be irrelevant. What would be relevant was whether there existed a "professional relationship" between the nursing home itself and the resident.

This argument is completely untenable for several reasons. Foremost among these is the fact that this argument cannot be reconciled with this Court's recent decision in *Cox v Flint Board of*

Hospital Managers, 467 Mich 1; 651 NW2d 356 (2002). *Cox* was a medical malpractice case arising out of negligence which occurred in the defendant hospital's neonatal intensive case unit. At trial, the court fashioned a jury instruction which defined malpractice as "something which a hospital neonatal intensive care unit would do or the doing of something which a hospital neonatal intensive care unit would not do under the same or similar circumstances." The defendant objected to this instruction and, following a verdict in favor of the plaintiff, this instructional error was appealed to this Court.

A majority of this Court in *Cox* ruled that this instruction constituted error requiring reversal. The Court concentrated its analysis of this instructional issue on the question of whether a hospital could be held vicariously liable for the negligence of one of its units as opposed to the negligence of a particular agent. This Court held in *Cox* that a hospital "can be held vicariously liable for the negligence of its employees and agents only. The 'neonatal intensive care unit' is neither an employee or an agent of the defendant." 467 Mich at 12. Thus, the Court in *Cox* stressed that a malpractice claim against a hospital based on vicarious liability exists only as to the acts of the institution's individual agents:

> The *negligence of the agents working in the unit, however, could provide a basis for vicarious liability*, provided plaintiffs met their burden on proving (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury *with respect to each agent alleged to have been negligent.*
>
> *Id.* at 362 (emphasis in original).

This Court's decision in *Cox* unequivocally instructs that a medical malpractice claim cannot be premised on the performance of a hospital unit or the performance of the hospital itself. Rather,

such a claim must be based on the conduct of particular agents of such an institution. *Cox*, therefore, specifically provides that the vicarious negligence of Oakpointe Villa must be based on the acts or omissions of its individual agents. Thus, the medical malpractice of Oakpointe Villa cannot be premised on the assertion that a professional relationship existed between Oakpointe Villa and Mrs. Hunt. Rather, to the extent a "professional relationship" is relevant to the question of whether medical malpractice occurred herein, that "professional relationship" must exist between Mrs. Hunt and the agents of the defendant whose negligence is at issue in this case.

Quite apart from this Court's decision in *Cox*, there are other reasons why the defendant's argument must be rejected. Ultimately, the most serious problem with this argument is that it proves too much. Under the defendant's analysis, a professional relationship would exist in *every* situation in which a nursing home resident is injured inside the confines of a nursing home. Thus, to accept the defendant's argument on this point is to accept the view that every single injury to a resident occurring within a nursing home may only be prosecuted as a medical malpractice action. The defendant's argument must be rejected.

This Court has on at least two occasions rendered decisions in the hospital setting which directly refute this argument. Again, a brief bit of history is instructive. In 1966, the Court of Appeals decided *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1966). In that case, the plaintiff, a patient in a hospital, summoned a nurse's aide to assist her in walking to the bathroom. The plaintiff warned the aide that it would take two people to assist her. The aide disregarded this warning and, on the way to the bathroom, the plaintiff slipped and fell when the aide was incapable of holding her. The plaintiff filed suit for the injuries she sustained in the fall. The defendant argued that plaintiff's claim was one for medical malpractice and, therefore, plaintiff had

to present standard of care testimony pertaining to hospitals. The Court of Appeals disagreed with the defendant and held that plaintiff's cause of action for the injuries she sustained in the fall was based on ordinary negligence. *Id.*, p. 102.

The holding in *Fogel* was reinforced in *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368; 146 NW2d 723 (1966). In *Gold*, the plaintiff fell from a hospital examination table as a result of negligence on the part of one of the hospital's nurses. The defendant asserted that this claim represented a cause of action for medical malpractice which had to be supported with expert testimony. The Court of Appeals in *Gold* disagreed. Relying on *Fogel*, the Court held that the plaintiff's claim presented a question of ordinary negligence, not medical malpractice. 5 Mich App at 370.

Fifteen years after *Fogel* and *Gold* were decided, this Court issued a decision in which it embraced the holdings in these two cases, while distinguishing them from the facts presented therein. *Wilson v Stillwell*, 411 Mich 587; 309 NW2d 898 (1981). In *Wilson*, the plaintiff was seriously injured when an infection developed in his arm following surgery. Plaintiff sued the hospital where the surgery had taken place, claiming, *inter alia*, that the hospital was negligent in failing to establish standards of conduct which would have required medical personnel to remain with the plaintiff to determine if an infection would develop. The plaintiff in *Wilson* argued that such a claim was an ordinary negligence claim comparable to *Fogel* and *Gold*.

In *Wilson*, this Court, citing both *Fogel* and *Gold*, came to the conclusion that not every case in which a hospital is sued for injuries occurring within its walls constitutes a medical malpractice claim.

The plaintiffs contend that this case presents a question of ordinary

> negligence and that no expert testimony was necessary. With respect to this assertion, *it seems evident that whether a hospital's negligence must be shown by expert testimony depends on the circumstances of the particular case.* The plaintiffs rely on two cases in support of their theory. *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), *clearly involved a case of ordinary negligence.* Fogel had warned a nurse's aide that one aide was not capable alone of helping her get to the bathroom. The aide could not hold her and she fell and fractured her hip. *Gold v Sinai Hospital of Detroit, Inc.*, 5 Mich App 368; 146 NW2d 723 (1966), also held that a patient's fall in a hospital was a matter of ordinary negligence. However, *these cases presented issues which are within the common knowledge and experience of a jury.*
>
> 411 Mich at 611 (emphasis added).

The Court in *Wilson* went on to draw the following distinction between the accidents which occurred in *Fogel* and *Gold* and the medical observation claim asserted by the plaintiff in that case:

> In contrast to *Fogel* and *Gold*, the instant case presents a standard of conduct issue which cannot be determined by common knowledge and experience, *but rather raises a question of medical judgment.*
>
> 411 Mich at 611, (emphasis added).

Three years later, in *Adkins, supra*, this Court reaffirmed that not every act of negligence occurring within a hospital constitutes medical malpractice. In *Adkins*, the Court found that plaintiff's claims sounded in malpractice. In doing so, the Court observed, again citing *Fogel* and *Gold*, that "some errors in patient treatment may, of course, be ordinary negligence rather than malpractice." 420 Mich at 95, n. 10.

At a minimum, *Wilson* and *Adkins* demonstrate that not every act of negligence occurring within the walls of a hospital or nursing home constitutes a claim for medical malpractice. Yet, the defendant, by suggesting that this Court focus exclusively on the existence of a "professional relationship" between a facility and a patient/resident, asks this Court to adopt such a rule. The

Court must decline to do so.

The defendant's argument that every cause of action which arises in a nursing home setting involving injury to a nursing home resident is a medical malpractice claim is also refuted by this Court's decision in *Dorris, supra*. In describing the difference between medical malpractice and ordinary negligence, the *Dorris* Court twice cited with favor a United States District Court decision, *McLeod v Plymouth Court Nursing Home, supra*. In *McLeod*, the plaintiff was a nursing home resident who was injured in a fall. The Court in *McLeod* held that the plaintiff's claim or damages was based on ordinary negligence, not medical malpractice. It is obvious that, if the defendant's argument with respect to "professional relationship" were correct, the result reached in *McLeod* would have been wrong since the professional relationship which defendant proposes existed between the plaintiff and the defendant in that case. The fact that the *McLeod* result was cited favorably by this Court in *Dorris* provides an additional reason why this Court must reject the defendant's attempt to recast every case involving injury to a nursing home resident as a medical malpractice claim.[6]

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[6]Another case which demands examination on this subject is *Hammack v Luterhan Social Services of Michigan*, 211 Mich App 1; 535 NW2d 215 (1995). In *Hammack*, plaintiff's decedent was a developmentally disabled individual who was a resident in a long term care home operated by the defendant. Plaintiff's decedent died when he was taking an unsupervised bath and suffered a seizure. This Court in *Hammack*, in an opinion written by then Judge Clifford Taylor, sustained a jury verdict rendered in plaintiff's favor. The defendant in *Hammack* never raised the question of whether the negligence alleged in that case amounted to medical malpractice, thus this Court was not called upon to address specifically whether the action sounded in medical malpractice. The *Hammack* opinion, however, clearly reflects the Court's view that this case was governed by traditional concepts of ordinary negligence. 211 Mich App at 5-7. However, if the defendant were correct in its argument regarding "professional relationship," even Mr. Hammack's drowning death would have to be classified as a claim for medical malpractice.

C. Under The Test Most Recently Employed In *Dorris*, The Court of Appeals Correctly Determined That This Was Not A Medical Malpractice Claim.

As noted previously, the common law test which controls in this case is that which this Court most recently addressed in *Dorris, supra*. In *Dorris*, the plaintiff was a patient in a hospital who was the victim of an assault and battery committed by one of the hospital's psychiatric patients. The sole negligence theory that the plaintiff offered against the hospital was that it had inadequate staffing to supervise and monitor its psychiatric patients. The plaintiff further argued in *Dorris* that these negligence claims were not medical malpractice claims subject to the requirements of MCL 600.2912b and MCL 600.2912d.

This Court in *Dorris* rejected the plaintiff's claim of ordinary negligence. In doing so, the Court cited with approval a federal district court's opinion in *McLeod v Plymouth Court Nursing Home, supra*, and the Court of Appeal's decision in *Bronson, supra*. Based on *Bronson,* the *Dorris* Court ruled:

> The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff.
>
> 460 Mich at 45.

After citing this language from *Bronson*, the Court went on to hold in *Dorris:*

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on *whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving*

medical judgment.

460 Mich at 46 (emphasis added).

The Court recognized in *Dorris* that one of the critical inquires for purposes of distinguishing between ordinary negligence and medical malpractice is whether "the negligence occurred within the course of a professional relationship." 460 Mich at 45. This point was reemphasized in the Court's more recent decision in *Cox, supra*, where is held that "crucial to any malpractice claim" is that the alleged negligence occur in the course of a professional relationship. 467 Mich at 10-11. This case fails this crucial test of a medical malpractice claim.

The negligence alleged in this case does not flow out of the existence of a professional relationship between the culpable agents of the defendant and Mrs. Hunt. To a considerable extent, the allegations of negligence contained in the case arise out of the actions or inactions of nursing aides employed by the defendant. It would be stretching the bounds of "professional relationship" beyond recognition to suggest that these unlicensed individuals who assist nursing home residents in eating, dressing and getting into and out of bed possess a "professional relationship" with residents such as Mrs. Hunt.

Indeed, there is a relatively clear indication in the legislative changes to medical malpractice litigation which confirm that Ms. Bryant's claims based on the negligence of unlicensed nursing aids could not rise to the level of a medical malpractice claim. The defendant has argued throughout this litigation that plaintiff's original complaint should have been dismissed because it was not accompanied by an affidavit of merit pursuant to MCL 600.2912d. That statute provides that, in every medical malpractice action, the plaintiff must file with the Complaint an affidavit signed by a "health professional" who "meets the requirements for an expert witness" under MCL 600.2169.

MCL 600.2912d(1). The language of MCL 600.2912d is mandatory; a plaintiff in a medical malpractice case must file such an affidavit with the complaint or the complaint is not even deemed filed. *Scarsella v Pollack*, 461 Mich 547; 607 NW2d 711 (2000).

Thus, if this were a medical malpractice action as defendant insists, Ms. Bryant could file this action only if it was accompanied by an affidavit of merit signed by a "health professional" qualified to do so under MCL 600.2169. MCL 600.2169 provides that a person may give expert testimony in a medical malpractice action (and, by operation of MCL 600.2912d(1), sign an affidavit of merit) only if a number of conditions are met. First, under MCL 600.2169(1) a person cannot give expert testimony in a medical malpractice case unless that person "is licensed as a health care professional in this state or another state." This would mean, of course, that a nursing aide who is not licensed under the laws of the State of Michigan would not be qualified to provide expert testimony under MCL 600.2169(1).

While the defendant has insisted that an affidavit of merit is required in this case, the defendant has not and cannot specify who would provide such an affidavit if the negligence involved is that of an unlicensed nursing aide. One would assume that the appropriate person to give standard of care testimony as to the conduct of a nursing aide would, in fact, be a nursing aide. Yet, it is clear that, based on the unequivocal text of MCL 600.2169, a nursing aide could not give expert testimony under that statute and, therefore, could not sign an affidavit of merit under MCL 600.2912d. The fact that there is no person with the qualifications necessary to sign an affidavit of merit in a case involving the alleged negligence of a nursing aide serves to enforce the fact that a cause of action premised on the negligence of a nursing aide cannot be characterized as a claim for medical

malpractice.[7]

In *Dorris*, this Court also indicated that the question of whether a particular claim sounds in medical malpractice is dependent on "whether the facts raise issues that are within the knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." 460 Mich at 465. Despite the defendants best efforts to reformulate and repackage the nature of plaintiff's allegations of negligence, the fact is that this case has nothing whatsoever to do with medical judgment. This case, as the Court of Appeals properly observed, was fundamentally premised on the fact that Mrs. Hunt was assigned a mattress which did not fit in the bed frame provided to her. This lack of fit allowed for a gap to exist between the mattress and the side rail, allowing a "fidgety" resident such as Mrs. Hunt to become trapped between the ill-fitted mattress and the side rail, ultimately resulting in her death by asphyxiation.

The essence of the negligence asserted in this case is, therefore, associated with the defendant's providing Mrs. Hunt with a device which presented a danger to Mrs. Hunt and the

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[7]Moreover, even if this cause of action could somehow be classified as a medical malpractice claim under *Dorris*, the fact remains that the affidavit of merit requirement of MCL 600.2912d is simply inapplicable to this claim. The expert witness statute referenced in MCL 600.2912d covers those situations in which expert testimony is to be given against a specialist, MCL 600.2169(1)(a), (b), or a general practitioner, MCL 600.2169(1)(c). Since the negligence which is the subject of this case involves neither that of a specialist nor a general practitioner, it would appear that both MCL 600.2169 and MCL 600.2912d are inapplicable here. In *Cox*, this Court ruled that MCL 600.2912a, a statute which describes the burden of proof as against a general practitioner or specialist, has no application to a cause of action filed against a nurse. 467 Mich at 16-17. Consistent with *Cox*, even if this Court could somehow conclude that plaintiff's claims based on the negligence of nursing aides constituted medical malpractice, the Court must conclude that the affidavit of merit requirement of MCL 600.2912d is inapplicable to such claims. *cf Nippa v Botsford Hospital (On Remand)*, 257 Mich App 387, 404-411; 668 NW2d 628 (2003) (C. J. Whitbeck, dissenting). Thus, even if the defendant were correct in its claim that this is a medical malpractice action, this case could not have been dismissed for plaintiff's failure to file an affidavit of merit with her original complaint.

defendant's agents' failure to do anything about these dangers, despite specific knowledge on the part of defendant's staff that such dangers existed. The major theme of plaintiff's complaint is that the defendant was negligent failing to provide Mrs. Hunt with what she was entitled to under federal and state regulations - an "accident-free environment." That negligence is not tied to the existence of a "professional relationship" between Mrs. Hunt and the defendants, nor is that negligence premised in any way on "medical judgment."

For purposes of this case, there is a critical distinction to be drawn between nursing home negligence and nursing home *medical* negligence. That distinction is well demonstrated in a Facility Guide which is supplied to state Surveyors of Long Term Care Facilities. (Apx. pgs. 50b-52b). This guide pertains to an FDA regulation which Oakpointe Villa was found to have violated, F 323(h)(1), which requires every nursing home facility to insure that, "the resident environment remains as free of accident hazards as possible." The Guidelines provided to state surveyors of nursing homes defines "accident hazards" as follows:

> "Accident hazards" are defined as physical features in the NF environment that can endanger a resident's safety, including but not limited to:
>
> - Physical restraints (See physical restraints §483.13);
> - Poorly maintained resident equipment (e.g., wheelchairs or geri-chairs with non-working brakes, and loose nuts and bolts on walkers);
> - Bathing facilities that do not have nonslip surfaces;
> - Hazards (e.g., electrical appliances with frayed wires, cleaning supplies easily accessible to cognitively impaired residents, we floors that are not obviously labeled and to which access is not blocked).

Facility Guide (Apx. pg. 51b).

The Facility Guide specifically distinguishes the "accident hazards" caused by environmental dangers in the nursing home setting and the injuries which might be caused to nursing home residents based on the consequences of medical care and treatment:

> An "accident is an unexpected, unintended event that can cause a resident bodily injury. *It does not include adverse outcomes associated as a direct consequence of treatment or care, (e.g., drug side effects or reactions).*
>
> (Apx. pg. 52b) (emphasis added).

The distinction made in the Facility Guide between *environmental* injuries to nursing home residents and *medical* injuries to nursing home residents is completely consistent with this Court's distinction between ordinary negligence and medical malpractice in *Dorris*. This cause of action is premised on the defendant's maintenance of an accident hazard, *i.e.* a dangerous physical feature *of the nursing home environment*. As a result of that dangerous feature of the nursing home environment, Mrs. Hunt suffered an accident, *i.e.*, "an unexpected, unintended event that can cause an injury." But what is of critical importance here is that Mrs. Hunt did not sustain an "accident' in the sense of an "adverse outcome *as a direct consequence of treatment or care.*"

These interpretive guidelines help demonstrate the fundamental fact that, while the complaint in this case is premised on the claim that Mrs. Hunt suffered an accident on March 2, 1997, plaintiff cannot and does not claim that Mrs. Hunt suffered a *medical* accident on that date. The negligence being asserted in this case is premised on the defendant's failure to keep Mrs. Hunt's *environment* free of accident hazards; this is not a case in which the defendant is being sued because of conduct directly or even indirectly associated with the providing of medical treatment or medical care. *Cf*

Hammack v Lutheran Social Services of Michigan, 211 Mich App 1, 5; 535 NW2d 215 (1995) (concluding that the duty question in a nursing home accidental drowning was governed by the general rule that premises owners must "exercise due care to protect invitees from conditions that might result in injury"); *Paulen v Shimick*, 291 Mich 288, 291-292; 289 NW 162 (1939) (testimony of expert not necessary where sanitarium nurse failed to lock third floor window screen and a depressed resident jumped out the window.)

The negligence asserted herein does not implicate *medical* judgments. The essence of plaintiff's complaint focuses on the dangerous *environment* presented to Mrs. Hunt by the defendant's acts and omissions, not on allegedly inadequate medical treatment or care which defendant might have provided to her. Thus, to the extent this case involves "judgments' made by the defendant, *these judgments are not medical in character.*

Following Mrs. Hunt's death, Oakpointe Villa was issued a citation by the Michigan Department of Consumer and Industry Services. (Apx. pgs. 3b-6b). As part of that citation process, Oakpointe Villa was required to submit a "Plan of Correction" to explain the steps that would be taken to prevent a recurrence of the situation which led to Mrs. Hunt's death. The "Plan of Correction" prepared by the defendant illuminates the fact that the negligence asserted herein has nothing to do with "medical judgment." Oakpointe Villa responded to the citation issued against it as follows:

> The facility has implemented corrective measures to ensure residents safety from entrapment while in bed. Revisions have been made in policy and procedure *for the required maintenance inspections* of beds and in Service Education for the proper use of side rails.
>
> We have now provided guidelines to eliminate a gap of no more than 5 inches, to prevent entrapment while in bed. *Maintenance has*

> *inspected and corrected all beds currently in use to ensure beds and crossbars are properly adjusted and mattress size and fit are appropriate.* This includes the adjustment of crossbars attaching the rails to the bed springs in order to prevent the bar from moving in and out.
>
> (Apx. pg. 6b) (emphasis added).

Oakpointe Villa's own "Plan of Correction" recognized that the responsibility for avoiding future injuries or death similar to Mrs. Hunt rested not with its medical staff or its licensed nursing staff. Rather, it was the responsibility of the defendant's *maintenance department* to ensure that there would be no future injuries of this type. Thus, by the defendant's own assessment, the dangerous condition which caused Mrs. Hunt's death was far removed from the types of medical judgments which might give rise to a cause of action sounding in medical malpractice.

Equally important to the test set out in *Dorris*, *Wilson*, and numerous other cases is the fact that no real ***judgments*** of any kind are involved in this case. The core of plaintiff's case herein is that the defendant breached its duty to provide Mrs. Hunt with an accident-free environment. (First Amended Complaint ¶10(a); (Apx. pg. 22a). The defendant has no "discretion" with respect to such a duty; the defendant does not exercise "judgment" (medical or otherwise) as to this particular obligation precisely because this obligation is directly imposed on the defendant both under state and federal law.

Similarly, one of the claims of negligence asserted by the plaintiff herein is that the nursing assistants who observed Mrs. Hunt's dangerous position on the day before her accident were under a duty to report what they observed to a supervisory nurse and, moreover, if that information was conveyed to a supervisory nurse, that nurse had to take action on the basis of that infraction. Again,

there is no dispute that this negligence implicates no judgments whatsoever since defendant conceded even before this case was filed that there was an affirmative obligation on the part of the nursing assistants to report what they saw and a similar obligation on the supervising nurse to act on that information if it was provided. *Cf. Robbins v Jewish Hospital of St. Louis*, 663 SW2d 341 (Mo App. 1984) (holding that a nurse following physicians orders was purely ministerial and routine, not the exercise of professional judgment).

To summarize, the negligence at issue in this case does not arise out of a professional medical relationship between Mrs. Hunt and any member of the staff of Oakpointe Villa. Moreover, the negligence being asserted in this case does not raise questions involving *medical* judgments. The Court of Appeals was, therefore, entirely correct when it concluded in its May 21, 2002 opinion:

> We find that plaintiff's complaint that defendant owed a duty to provide an accident-free environment sounds in ordinary negligence and not medical malpractice. Plaintiff's complaint does not call into question the medical judgment of the nursing home in utilizing bed rails for decedent; it does not allege that an error was made regarding decedent's "medical symptoms" or that defendant failed to adhere to the specified "circumstances under which bed rails [were] . . . to be used." MCL 333.21734. Rather, plaintiff's allegation is that decedent died as a result of improper custodial care. Plaintiff's allegation involving the safety of the environment in which decedent was placed and the acts and omissions of decedent and its employees simply does not impugn the exercise of medical judgment.
>
> (Apx. pg. 124a) (citations omitted).

The defendant does its best to place this case within the ambit of a medical malpractice claim. The defendant argues that some sort of professional judgment was necessary to determine that the environmental conditions presented to Mrs. Hunt represented a serious danger. This argument is completely unsupportable by the facts of this case. The testimony clearly established that Ms.

Roundtree, one of the defendant's nursing aides, recognized immediately on March 1, 1997 when she saw Mrs. Hunt that "if they don't watch it, they will find this lady hung." Ms. Roundtree required neither a medical degree nor a nursing license to come to the conclusion that a resident in Mrs. Hunt's condition faced a great potential for harm when she was supplied with a mattress which did not fit her bed.

The defendant also argues that this case is a medical malpractice case because it implicates a medical decision to place a bed rail restraint on Mrs. Hunt's bed. As the Court of Appeals correctly held, the negligence alleged in this case does not involve bed rails. Plaintiff has never suggested that defendant is liable in this case for placing bed rails on Mrs. Hunt's bed. The Court of Appeals ruled below:

> Moreover, plaintiff's complaint does not allege that the use of the bed rails was inappropriate in this case. Plaintiff's complaint clearly focuses on the fact that the decedent died as a result of becoming caught in the gap between the bed rail and the mattress. While the manner in which decedent was asphyxiated implicates the equipment that made up her bed, the crux of plaintiff's action is no more a question of whether bed rails were medically appropriate than whether the use of a mattress was medically appropriate.

(Apx. pg. 125a).

This Court indicated in *Dorris* that a plaintiff may not circumvent the requirements established in law for medical malpractice claim "by couching the cause of action in terms of ordinary negligence." 460 Mich at 43. But the converse of this is also true; a defendant cannot seek to impose the procedural requirements applicable to a medical malpractice claim on a claim for ordinary negligence by recasting that negligence claim as malpractice. The Court must, therefore, reject the defendant's efforts to reformulate the plaintiff's negligence claim into a claim for medical

malpractice.

II. WHAT SHOULD HAPPEN ON REMAND IF THIS COURT REVERSED THE COURT OF APPEALS' DETERMINATION THAT PLAINTIFF'S CLAIM IS NOT A MEDICAL MALPRACTICE CLAIM.

Based on the foregoing arguments, this Court should affirm the Court of Appeals' determination that Ms. Bryant's cause of action is not a medical malpractice claim. Plaintiff will, however, briefly address the question of the results which should follow a reversal of the Court of Appeals' decision.

First, based on the reasoning employed by this Court in *Cox*, the Court should conclude that, even if this case is classified as a medical malpractice claim, the affidavit of merit requirement specified in MCL 600.2912d is inapplicable to this case since this case involves neither the professional negligence of a medical specialist nor that of a "general practitioner" as described in MCL 600.2169. *See* fn. 7, *supra*. Since MCL 600.2912d, the affidavit of merit statute, incorporates the requirements of MCL 600.2169 and that statute does not apply here, the court should conclude that this case could not have been dismissed for plaintiff's failure to file an affidavit of merit with her original complaint.[8]

Finally, plaintiff would briefly address the appeal which the defendant filed in the Court of Appeals. Oakpointe Villa was granted leave to appeal to raise the question of whether Mrs. Bryant's refiled cause of action (Apx. pgs. 20a-27a) was timely filed. The circuit court had held that this cause of action was timely filed because the limitations period was tolled by events which occurred during plaintiff's originally filed case. (Apx. pgs. 117a-122a).

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[8]Plaintiff would again stress that the inapplicability of MCL 600.2169 to this case should lead to a very different conclusion - that this is not a cause of action for medical malpractice.

Based on its resolution of Ms. Bryant's appeal, the Court of Appeals was not called upon to address this tolling ruling. The Court of Appeals concluded in its May 21, 2002 Opinion that the circuit court had erred in dismissing the original case which Ms. Bryant filed. Thus, the result of the Court of Appeals' ruling in this case was the complete reinstatement of the case which Ms. Bryant originally filed in March 1998. Since plaintiff's original case was reinstated by the Court of Appeals, that Court did not need to consider the status of plaintiff's refiled case since that refiled case was being pursued only because the circuit court had dismissed plaintiff's original case.

The Court of Appeals majority understood that it was unnecessary for it to reach any issue in the defendant's appeal. The Court of Appeals recognized that, in light of its ruling in Ms. Bryant's appeal, consideration of Oakpointe Villa's appeal was "essentially moot." (Apx. pg. 125a). Despite its recognition that the issues raised in defendant's appeal were moot, the Court of Appeals proceeded to address these issues anyway, "reversing" the circuit court's decision. (Apx. pgs. 125a-126a).

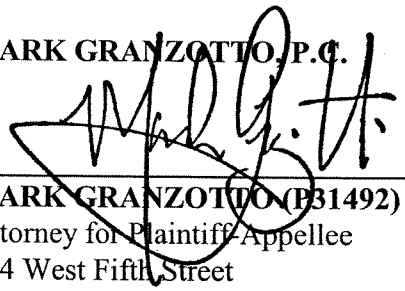
By the Court of Appeals' own acknowledgment, its decision addressing Oakpointe Villa's appeal was dictum, since the issues raised therein were moot. If this Court were to reverse the Court of Appeals' central determination that this case is not a medical malpractice claim, the appropriate thing for this Court to do would be to remand this case to the Court of Appeals for a definitive (non-dictum) determination of the issues raised in defendant's appeal. Such a remand would be particularly appropriate in light of the implications of this Court's decision in *Cox*, a case which was not released at the time the Court of Appeals issued its decision in this case.

RELIEF REQUESTED

Based on the foregoing, Plaintiff-Appellant, Denise Bryant, Personal Representative of the Estate of Catherine Hunt, Deceased, respectfully requests that this Court affirm the Michigan Court of Appeals' May 21, 2002 Opinion in its entirety and remand this matter to the Wayne County Circuit Court for further proceedings.

Respectfully submitted,

MARK GRANZOTTO, P.C.



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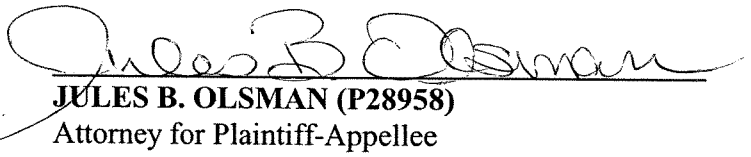

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Dated: October 30, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased,

Plaintiff-Appellee,

-vs-

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No. 121723

Court of Appeals No. 228972

Lower Court No. 98-810412-NO

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, DECEASED,

Plaintiff-Appellee,

-vs-

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No. 121724

Court of Appeals No. 234992

Lower Court No. 01-104360-NH

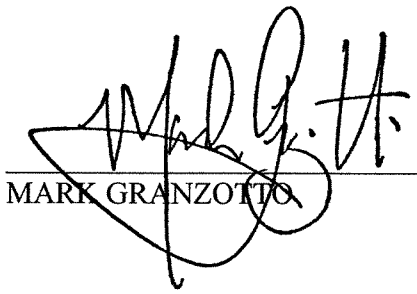
PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

MARK GRANZOTTO, being first duly sworn, deposes and states that on the 30th day of October, 2003, he mailed a copy of an **Plaintiff-Appellee's Brief on Appeal** and **Plaintiff-Appellee's Appendix** to **Susan Healy Zitterman, One Woodward Avenue, 10th Floor, Detroit, Michigan 48226**, by placing said documents in the United States mail with postage

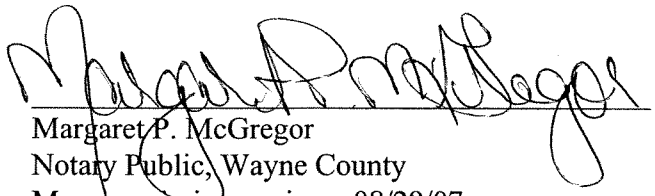
affixed thereto.

Further deponent saith not.



MARK GRANZOTTO

Subscribed and sworn to before me
this 30th day of October, 2003.



Margaret P. McGregor
Notary Public, Wayne County
My commission expires: 08/29/07